Supreme Court, U.S.
FILED
SEP 5 1996
CLERK

No. 96 - 200

IN THE

Supreme Court Of The United States

OCTOBER TERM 1996

COASTAL FUELS OF PUERTO RICO, INC.,

Cross-Petitioner,

v.

CARIBBEAN PETROLEUM CORPORATION,

Cross-Respondent.

On Conditional Cross-Petition for Writ of Certiorari
to the United States Court of Appeals for the First Circuit

CROSS-RESPONDENT'S BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

William L. Patton
Counsel of Record
Thomas B. Smith
David A. Brown
ROPES & GRAY
One International Place
Boston, MA 02110
(617) 951-7000
Attorneys for Petitioner
and Cross-Respondent

Balmar Legal Publishing Department, Washington, DC (202) 682-9800

RULE 29.6 DISCLOSURE

Caribbean Petroleum Corporation is a subsidiary of Oil Resources International, Ltd., a British Virgin Island international business company, which is a subsidiary of First Oil International, Ltd., a British Virgin Island international business company. Caribbean Petroleum Corporation does not own a controlling interest in any subsidiary corporation. Caribbean Petroleum Corporation owns ninety-nine percent (99%) interests in two Delaware limited partnerships, Caribbean Petroleum Limited Partners and Caribbean Petroleum Refinery Limited Partners.

No. 96-200

IN THE

Supreme Court Of The United States

OCTOBER TERM 1996

COASTAL FUELS OF PUERTO RICO, INC.,

Cross-Petitioner,

v.

CARIBBEAN PETROLEUM CORPORATION,

Cross-Respondent.

CROSS-RESPONDENT'S BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

The Conditional Cross-Petition for Writ of Certiorari filed by Coastal Fuels of Puerto Rico, Inc. ("Coastal") presents no issue worthy of review by this Court. The court of appeals' holding that the relevant geographic market for the sale of marine fuel to ocean-going vessels calling on the Port of San Juan includes the Caribbean and the southeastern United States is both correct and unremarkable. Ships plying these waters can and do move. They buy marine fuel from many different suppliers operating in ports located throughout this region.

The decision by the court of appeals presents no conflict with decisions by other courts of appeals, and is based on well-settled principles of antitrust law. At most, Coastal presents a challenge to the court of appeals' factual finding about the relevant geographic market. Coastal is wrong on the mer-

its. More fundamentally, such a challenge does not support the grant of Coastal's conditional cross-petition.

DECISION BY THE COURT OF APPEALS

The court of appeals correctly stated and applied the existing law on Coastal's Sherman Act claim, as follows:

> The touchstone of market definition is whether a hypothetical monopolist could raise prices. *See Rebel Oil Co.*, 51 F.3d at 1434. Although a reseller based in San Juan may have nowhere to turn to in San Juan for its fuel, Coastal did not produce sufficient evidence that this meant CAPECO has the ability to restrict supply and raise prices in San Juan to supracompetitive levels. Indeed, the evidence points in the other direction. CAPECO cannot sell its residual oil for bunker fuel unless it does so at a price at which the resellers will be able to sell the fuel to its ultimate consumers, the ocean-going vessels. Those ocean-going vessels can go anywhere in the Caribbean and Southeastern United States to get their bunker fuel. If CAPECO were to raise its prices to the resellers, the resellers could not offer the bunker fuel at competitive prices and the ocean-going vessels would simply get their fuel at another port.

Pet. App. 26a-27a. In ruling on Coastal's petition for rehearing, the court of appeals again correctly stated and applied existing law. Pet. App. 42a.

REASONS TO DENY THE CONDITIONAL CROSS-PETITION

Coastal's cross-petition is nothing more than a proforma appeal of a well-reasoned and well-supported decision by the court of appeals. No important issue of law or fact is presented that would merit this Court's review. Coastal's arguments also are fatally flawed on the merits.

The holding by the court of appeals that the relevant market for Coastal's monopolization claim includes the Caribbean and the southeastern United States is fully supported by the record. Ocean-going ships can purchase fuel in any number of ports within this market on which they call. *E.g.*, A. 721-722, 1188-1190. The price that can be charged for fuel oil in San Juan is constrained by the price charged in other ports. A. 1323-1324. Since suppliers in other ports compete for the business of providing fuel oil to the same ocean-going ships, the relevant geographic market for Coastal's Sherman Act claim necessarily includes those other ports. *Compare Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*, 784 F.2d 1325, 1336-37 (7th Cir. 1996) (cited by the court of appeals at Pet. App. 27a).

Under Section 2 of the Sherman Act, Coastal had the burden to prove that CAPECO had monopoly power in the relevant market. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 481 (1992). Market power in this sense is the ability of a supplier to raise prices above competitive levels, for example by cutting back the total output of a product available to the market and thereby causing its price to rise. *Id.* at 464; *Ball Memorial Hospital, Inc.*, 784 F.2d at 1331 (citing, *inter alia*, *NCAA v. University of Oklahoma*, 468 U.S. 85 (1984); *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956)). Lowering prices to predatory levels, i.e., to levels below cost, may also be indicative of market power violative of the Sherman Act *so long as* the supplier has a dangerous probability of recovering its foregone profits by raising prices in the future. *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2588 (1993).

Coastal did not introduce evidence that CAPECO raised its prices above competitive levels in the relevant market. Rather, its evidence consisted almost exclusively of prices in San Juan alone. As the court of appeals correctly found, however, the prevailing prices in the relevant market, the Carib-

bean and southeastern United States, curtailed the prices that could be charged for fuel in San Juan. *E.g.*, A. 721-722, 1188-1190, 1191-1193. Coastal introduced no evidence to the contrary. Similarly, Coastal introduced no evidence that CAPECO charged predatory prices, i.e., prices below its cost of production. *E.g.*, A. 496, 616, 624, 709-10, 726-27. The mere fact that Coastal introduced some evidence that CAPECO charged customers lower prices from time to time does not establish the existence of market power under Section 2 of the Sherman Act. *Brooke Group, Ltd.*, 113 S. Ct. at 2588. *See also Monahan's Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525, 527 (1st Cir. 1989). Coastal's failure to prove that CAPECO exercised or had the ability to exercise monopolistic market power is fatal to its Sherman Act claim. *See Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 671 (7th Cir. 1985) ("[P]laintiffs] did not establish market power. They failed as a matter of law. This failure makes every other element of the anti-trust case irrelevant."), *cert. denied*, 475 U.S. 1129 (1986).

Coastal argues that the bare existence of different prices charged by CAPECO over time is sufficient to prove the requisite monopoly power. Coastal's argument fails for at least two reasons. First, different prices alone do not establish a claim under Section 2 of the Sherman Act. *Brooke Group, Ltd.*, 113 S. Ct. at 2588; *Monahan's Marine, Inc.*, 866 F.2d at 528, 529. In order to prevail, Coastal had to prove that CAPECO charged either supracompetitive prices or unnaturally low prices with a dangerous probability of recoupment by charging higher prices in the future. *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir.), *cert. denied*, 116 S. Ct. 515 (1995). Coastal failed to meet its burden of proof in either respect.

Second, there was no evidence that CAPECO had the ability to *raise* prices above competitive levels. Indeed, the evidence was to the contrary -- the price that could be charged for fuel oil in the Port of San Juan was constrained by the

prices charged in other ports. A. 1323-1324. No inference of market power, and no Sherman Act violation, arises from CAPECO's charging *lower* prices to some customers but not others, particularly in the absence of any evidence that CAPECO's prices were set below cost. *Brooke Group, Ltd.*, 113 S. Ct. at 2588-89. *See generally Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 231, 235 (1st Cir. 1983). There is no conflict between the court of appeals' finding of no market power in this situation and the cases cited by Coastal in its Cross-Petition, which uniformly involved higher-than-market prices.

Coastal argues that its competitors' profit margins were eroded down to insignificant levels because of higher prices being charged to them by CAPECO. *See* Conditional Cross-Petition, at 14. This argument demonstrates that the prices CAPECO could charge were constrained by competition within the relevant market, since by its own argument neither Coastal nor its competitors could charge higher-than-market prices to the cruise ships that bought the bunker fuel.

CONCLUSION

Coastal's Conditional Cross-Petition for Writ of Certiorari should be denied.

Respectfully submitted,

William L. Patton
Counsel of Record
Thomas B. Smith
David A. Brown
ROPES & GRAY
One International Place
Boston, MA 02110
(617) 951-7000

Dated: September 5, 1996